Subramaniam a/l Paramasivam & Ors v Malaysian Airlines System Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5–24–355 OF 1995
KANG HWEE GEE J
7 NOVEMBER 2001

Contract *— Breach — Action for damages — Contract of carriage to convey plaintiffs from India to Malaysia — Plaintiffs landed with their baggage — Plaintiffs' baggage reweighed at destination — Whether breach of contract — Whether defendant's contractual obligations discharged without breach when plaintiffs arrived at destination with their baggage*

Contract *— Damages — Remoteness — Claim for non pecuniary losses — Contract of carriage to convey plaintiffs from India to Malaysia — Plaintiffs landed with their baggage — Plaintiffs' baggage reweighed at destination — Whether losses suffered by plaintiffs were reasonably expected to be within contemplation of plaintiffs and defendant when they entered into contract — Whether losses were too remote — Contracts Act 1950 s 74(1)*

Tort *— Damages — Infringement of rights — Plaintiffs' baggage reweighed at destination — Infringement of right not to be forced into paying excess baggage — Assessment of damages — Whether damages awarded were excessive and disproportionate — Whether plaintiffs proved their loss*

The plaintiffs flew into Kuala Lumpur from Madras on the defendant's aeroplane. Upon their arrival at the Subang International Airport, the plaintiffs were stopped by the defendant's officer who insisted that their baggage be reweighed. Their baggage was found to be 60kg in excess instead of only 20kg as determined at the Madras airport and the plaintiffs were asked to pay an additional RM618 for the excess baggage. The plaintiffs spent some two hours in the airport due to this incident. By this originating summons, the plaintiffs sought a declaration that the defendant had no right to charge the excess baggage charges and that the said charges be refunded to them. The judicial commissioner allowed the plaintiffs' application and damages were accordingly assessed by the registrar. The registrar found that the plaintiffs had suffered physical inconvenience, mental distress, agony and humiliation for having been kept 'virtually captive' at the airport. Consequently, the registrar awarded general damages of RM75,000, RM12,000 and RM15,000 to the first plaintiff, the second plaintiff and the third plaintiff respectively. The defendant appealed.

Held, allowing the appeal:

(1) The registrar had proceeded to assess damages on the basis that the defendant had committed a breach of contract, notwithstanding that the defendant could not have been liable on

a breach of contract as the defendant's contractual obligations had been performed and discharged without a breach by the time the plaintiffs landed with their baggage at the Subang International Airport (see pp 53I–54A). A

(2) The contract of carriage to convey the plaintiffs from India to Malaysia was of a nature that affected the personal, social and family interest of the plaintiffs. The contract therefore, belonged to that class in which non pecuniary loss may be awarded for any breach committed by the defendant. The next question to consider was whether the non pecuniary loss suffered by the plaintiffs arose naturally from the breach. It would be quite legitimate to assume that if the defendant chose to re-weigh the plaintiffs' baggage at the Subang International Airport in breach of its contract with the plaintiffs, the plaintiff would not in the natural course of things have suffered such aggravated pecuniary loss as mental distress, agony, humiliation, loss of reputation and injured feelings. Nor would such losses be reasonably expected to be within the contemplation of the plaintiffs and defendant when they entered into the contract. These were clearly matters which, under s 74(1) and (2) of the Contracts Act 1950 would be considered as too remote and therefore not recoverable (see p 56B–G). B C D

(3) The loss suffered by the plaintiffs was limited to some inconvenience and discomfort that would not have been substantial enough to be recoverable. It was not uncommon for a contracting party to encounter some difficulty in the performance of his obligations. Where eventually that obligation was performed, some allowance exempt from liability within the permissible limit of give and take can be made for minor imperfections (see pp 56G–H, 57B); *Hobbs & Wife v The London and South Western Railway Co* [1875] QB 111 followed and *Jarvis v Swans Tours Ltd* [1973] QB 233 distinguished. E F

(4) Here, the defendant's liability clearly arose from a tort rather than from a breach of contract. The infringement of the plaintiffs' right not to be forced into paying the excess baggage gave rise to an action in tort. Therefore, the assessment of damages should have been based on liability on tort and not breach of contract (see pp 60D, G, 61A). G

(5) In awarding damages, the guiding principles were that the damages awarded should put the plaintiffs in the same position as they would have been if they had not sustained the wrong and that the plaintiffs should not be allowed to profit from the damages awarded. In the instant case, it was obvious that the registrar had awarded too much for too little. The award, in multiples of thousands, was outrageously excessive and disproportionate and exceeded many times the cost of air passage that the plaintiffs had paid (see pp 61G–H, 62A–B); *Livingstone v The Rawyards Coal Co* H I

(1880) 5 App Cas 25 and *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 followed.

(6) The other principle was that the plaintiff had to prove his loss and in this regard, the plaintiff had to provide some form of evidence sufficient to convince the decider to the point that he believed it to exist or considered its existence so probable that a prudent man ought, under the circumstances of the particular case, to act on the supposition that it existed. In the instant case, the plaintiffs provided none of the evidence that they claimed to have suffered beyond the mere assertion of having suffered them. The testimonies of the two witnesses stating that their esteem of the first plaintiff had been lowered after the incident at the airport were unbelievable and ought not to have been accepted as proof that the first plaintiff had suffered loss of reputation. In respect of the second plaintiff, the medical practitioner who gave evidence merely repeated the second plaintiff's complaints as no formal examination was conducted on the second plaintiff. Furthermore, her complaint that she suffered flight phobia because the aeroplane was carrying excess weight was totally unfounded. The third plaintiff's claim that she suffered so much from the incident that she had been unable to continue with her part time business of organizing tours and had to seek the blessings of a priest in India was unrealistic. A reasonable man would not be able to comprehend how the effect of being detained at the airport for two hours and being made to pay additional excess baggage could cause such suffering as to affect her capacity to continue with her part time tour business (see pp 62D–63A); *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 and *Bonham-Carter v Hyde Park Hotel Ltd* 64 TLR 177 followed.

(7) The plaintiffs had proved that their legal right had been infringed. It was not true to say that the plaintiffs had not suffered any loss for the period that they were kept at the airport or that they were unable to prove that they had suffer any loss. As such, an award of nominal damages under the circumstances was inappropriate. The plaintiffs did suffer some discomfort and inconvenience, albeit for a short duration of two hours and although they appeared trivial and small, the plaintiffs were nevertheless entitled to have them assessed. Accordingly, the plaintiff should be compensated for the discomfort and inconvenience they had undergone and this translated to RM300 for each plaintiff, that is, the cost of providing each of them with a day's rest (see pp 63B, F–G, 64A).

[Bahasa Malaysia summary

Plaintif-plaintif telah menaiki kapal terbang defendan ke Kuala Lumpur daripada Madras. Setibanya mereka di Lapangan Terbang

Antarabangsa Subang, plaintif-plaintif telah ditahan oleh pegawai defendan yang mendesak supaya bagasi mereka ditimbang semula. Bagasi mereka didapati 60kg lebih berat dan bukan hanya 20kg seperti mana yang ditetapkan di Lapangan Terbang Madras dan plaintif-plaintif telah diminta supaya membayar sebanyak RM618 tambahan bagi bagasi yang melebihi itu. Plaintif-plaintif telah menghabiskan hampir dua jam di lapangan terbang tersebut disebabkan peristiwa ini. Melalui saman pemula ini, plaintif-plaintif memohon satu pengisytiharan bahawa defendan tiada hak untuk mengenakan bayaran bagasi lebihan dan bahawa bayaran tersebut hendaklah dibayar balik kepada mereka. Pesuruhjaya kehakiman tersebut telah membenarkan permohonan plaintif-plaintif dan ganti rugi telah sehubungan itu ditaksirkan oleh pendaftar. Pendaftar mendapati bahawa plaintif-plaintif telah mengalami kesukaran fizikal, distres mental, kesusahan dan malu kerana telah ditahan di lapang terbang tersebut. Akibatnya, pendaftar telah mengawardkan ganti rugi am sebanyak RM75,000, RM12,000 dan RM15,000 kepada plaintif pertama, plaintif kedua dan plaintif ketiga masing-masingnya. Defendan telah merayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Pendaftar telah menaksirkan ganti rugi atas dasar bahawa defendan telah melakukan keingkaran kontrak, meskipun defendan mungkin tidak bertanggungan atas keingkaran kontrak kerana kewajipan kontraktual defendan telah dilaksanakan tanpa keingkaran ketika plaintif-plaintif mendarat bersama bagasi mereka di Lapangan Antarabangsa Subang (lihat ms 53I–54A).

(2) Kontrak pengangkutan untuk menghantar plaintif-plaintif daripada India ke Malaysia adalah berkaitan kepentingan peribadi, sosial dan keluarga plaintif-plaintif. Kontrak tersebut dengan itu, terlingkung pada kelas dalam mana kerugian bukan wang boleh diberikan bagi sebarang keingkaran yang dilakukan oleh defendan. Persoalan untuk dipertimbangkan adalah sama ada kerugian bukan wang yang dialami oleh plaintif-plaintif berbangkit tentunya daripada keingkaran tersebut. Adalah agak patut untuk menganggarkan bahawa jika defendan memilih untuk menimbang semula bagasi plaintif-plaintif di Lapangan Terbang Antarabangsa Subang dengan mengingkari kontrak dengan plaintif-plaintif, plaintif-plaintif tidak akan dalam perjalanan perkara biasa mengalami kerugian kewangan yang teruk kerana distres mental, kesukaran, malu dan kehilangan reputasi dan perasaan yang terjejas. Kerugian-kerugian yang sedemikian juga tidak mungkin dijangkakan terlingkung di dalam kontemplasi plaintif-plaintif dan defendan ketika mereka memasuki kontrak tersebut. Ini adalah jelas merupakan perkara-perkara yang mana, di bawah s 74(1) dan (2) Akta Kontrak 1950 akan dianggapkan

terlalu di luar jangkaan dan dengan itu tidak boleh diperolehi kembali (lihat ms 56B–G).

(3) Kerugian yang dialami oleh plaintif-plaintif adalah terhad kepada ketidak-selesaan dan kesukaran yang mungkin tidak begitu substansial untuk diperolehi kembali. Ianya tidak merupakan perkara luar biasa untuk berhadapan dengan kesukaran dalam melaksanakan kewajipan beliau. Di mana kewajipan tersebut telah akhirnya dilaksanakan, sedikit kelonggaran yang memberi pengecualian di dalam lingkungan had bertolak ansur boleh dibuat untuk ketidaksempurnaan yang kecil (lihat ms 56G–H, 57B); *Hobbs & Wife v The London and South Western Railway Co* [1875] QB 111 diikut dan *Jarvis v Swans Tours Ltd* [1973] QB 233 dibeza.

(4) Di sini, tanggungan defendan jelas berbangkit daripada tort dan bukannya daripada keingkaran kontrak. Perlanggaran hak plaintif-plaintif untuk tidak dipaksa supaya membayar bagasi yang melebihi itu telah membangkitkan tindakan dalam tort. Oleh itu, taksiran ganti rugi sepatutnya telah diasaskan atas tanggungan ke atas tort dan bukannya keingkaran kontrak (lihat ms 60D, G, 61A).

(5) Dalam mengawardkan ganti rugi, prinsip-prinsip bimbingan adalah bahawa ganti rugi yang diawardkan seharusnya meletakkan plaintif-plaintif dalam kedudukan yang sama seperti mana yang mereka sepatutnya berada jika mereka tidak mengalami kesalahan tersebut dan bahawa plaintif-plaintif seharusnya tidak dibenarkan untuk memperolehi keuntungan daripada ganti rugi yang diawardkan. Dalam kes semasa, adalah nyata bahawa pendaftar telah memberikan award yang terlalu banyak untuk perkara yang terlalu sedikit. Award tersebut, dalam berbilangan ribu, adalah amat keterlaluan dan tidak berpatutan dan melebihi berkali ganda kos tambang penerbangan yang plaintif-plaintif telah bayar (lihat ms 61G–H, 62A–B); *Livingstone v The Rawyards Coal Co* (1880) 5 App Cas 25 dan *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 diikut.

(6) Prinsip yang lain adalah bahawa plaintif-plaintif haruslah membuktikan kerugiannya dan sehubungan dengan ini, plaintif mesti memberi keterangan yang memadai untuk mempengaruhi pihak yang membuat keputusan sehinggakan beliau mempercayai ianya wujud atau mempertimbangkan kewujudannya yang amat berkemungkinan bahawa seorang yang berhemat sepatutnya, di bawah keadaan kes tertentu tersebut, untuk bertindak atas tanggapan bahawa ianya wujud. Dalam kes semasa, plaintif-plaintif telah memberikan tidak satu pun dari keterangan yang mereka untuk telah dialami melebihi penegasan bahawa mereka telah hanya mengalaminya. Testimoni-testimoni kedua-dua saksi tersebut yang menyatakan bahawa pandangan mereka mengenai

plaintif pertama telah berkurangan selepas peristiwa di lapangan terbang tersebut adalah di luar jangkaan dan haruslah tidak diterima sebagai bukti bahawa plaintif pertama telah mengalami kehilangan reputasi. Berhubung plaintif kedua, pengamal perubatan yang memberi keterangan hanya mengulangi aduan plaintif kedua kerana tiada pemeriksaan rasmi telah dikendalikan ke atas plaintif kedua. Lagipun, aduan beliau bahawa beliau telah mengalami fobia kerana kapal terbang tersebut membawa berat yang berlebihan adalah sesungguhnya tidak berasas. Tuntutan plaintif ketiga yang beliau telah mengalami kesusahan yang amat sangat disebabkan peristiwa itu hinggakan beliau tidak dapat meneruskan perniagaan sambilan beliau mengatur perjalanan pelancungan dan terpaksa mendapatkan restu daripada seorang sami di India adalah sesungguhnya tidak masuk akal. Seseorang yang berfikiran waras tidak dapat membayangkan bagaimana kesan ditahan di sebuah lapangan terbang selama dua jam dan dikehendaki membayar bagi berat bagasi yang berlebihan boleh menyebabkan kesusahan sedemikian hingga menjejaskan keupayaan beliau untuk meneruskan perniagaan pelancongan sambilan beliau (lihat ms 62D–63A); *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 dan *Bonham-Carter v Hyde Park Hotel Ltd* 64 TLR 177 diikut.

(7) Plaintif-plaintif telah membuktikan bahawa hak mereka di sisi undang-undang telah diingkari. Adalah tidak benar untuk menyatakan bahawa plaintif-plaintif telah tidak mengalami sebarang kerugian bagi tempoh yang mereka telah ditahan di lapangan terbang tersebut atau bahawa mereka tidak dapat membuktikan bahawa mereka telah mengalami sebarang kerugian. Oleh yang sdemikian, suatu award bagi ganti rugi nominal di bawah keadaan tersebut adalah tidak wajar. Plaintif-plaintif tersebut sesungguhnya telah mengalami kesukaran dan ketidak-selesaan, meskipun untuk tempoh masa yang singkat selama dua jam dan walaupun ianya kelihatan remeh dan kecil, plaintif-plaintif tersebut namun begitu berhak untuk meminta supaya ianya ditaksirkan. Sehubungan itu, plaintif haruslah diberikan pampasan bagi kesusahan dan ketidak-selesaan yang telah mereka alami dan dengan itu diberikan RM300 bagi setiap satu plaintif, bahawa iaitu kos bagi memberikan setiap seorang dari mereka tempoh beristirehat selama sehari (see pp 63B, F–G, 64A).]

Notes

For cases on breach of contract generally, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1946–2088.

For cases on remoteness of damages, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2549–2550.

A For cases on claim for damages under tort, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 116–189.

Cases referred to

B *Ashby v White* (1703) 2 Lord Ryam 938 (refd)
Bonham-Carter v Hyde Park Hotel Ltd 64 TLR 177 (folld)
C & P Haulage (a firm) v Middleton [1983] 3 All ER 94 (refd)
Flint v Lovell [1935] 1 KB 354 (refd)
Fraser & Neave Ltd v Yeo Hiap Seng Ltd [1989] 1 MLJ 91 (refd)
Hadley v Baxendale (1854) 9 Exch 341 (refd)
C *Haron bin Mundir v Singapore Amateur Athletic Association* [1992] 1 SLR 18 (refd)
Hobbs & Wife v The London and South Western Railway Co [1875] QB 111 (folld)
Jarvis v Swans Tours Ltd [1973] QB 233 (distd)
John v Dharmaratnam [1962] MLJ 187 (refd)
D *Kitchen v non pecuniary Air Forces Association & Ors* [1958] 2 All ER 241 (refd)
Livingstone v The Rawyards Coal Co (1880) 5 App Cas 25 (folld)
Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569 (refd)
'Mediana', The [1900] AC 113 (refd)
E *Nicholls v Ely Beet, Sugar Factory Ltd* [1936] Ch 343 (refd)
Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777 (folld)
F *Watts & Anor v Morrow* [1991] 1 WLR 1421 (refd)

Legislation referred to

Contracts Act 1950 s 74(1), (2)
Evidence Act 1950 s 2

G

Subramaniam Paramasivam (*Subra & Partners*) for the plaintiff.
Shaiful Omar Ahmad (*Aziz Zakaria Shaiful & Wan*) for the defendant.

H **Kang Hwee Gee J:** The plaintiffs were passengers of Malaysian Air System Flight MH 181 from Madras to Kuala Lumpur on 1 June 1995. They had checked in with their baggage at Madras airport at about 9pm on that day and had an excess baggage of 20 kgs. They paid the excess baggage payment of Rs 4080 (RM325) imposed by the defendant.

I Upon landing at Subang International Airport, Kuala Lumpur, the plaintiffs were stopped by an officer of the airline who insisted that their baggage be reweighed. They were at the time proceeding to customs with their baggage on trolleys. They were directed to a baggage counter where the defendant's employees went through another process of reweighing

their baggage. Their baggage was found to be 60 kgs in excess instead of only 20 kgs as determined at Madras Airport. They insisted that the plaintiffs pay an additional RM618 failing which their baggage would not be released to them.

They protested but to no avail. The ordeal lasted some two hours from 5.40am to 7.40am, when in the end the plaintiffs managed somehow to settle the sums with the defendant.

The plaintiffs sought, by this originating summons, a declaration that the defendant had no right to charge the plaintiffs an excess baggage payment of RM618 at the Subang International Airport on 2 June 1995, and that the imposition of such a charge on the plaintiffs was void and illegal.

They also sought an order that the said sum of RM618 be returned to them and that damages suffered by the plaintiffs be assessed by the senior assistant registrar.

Kamalanathan Ratnam JC (as he then was) before whom the originating summons was heard, gave judgment for the plaintiff. He ordered damages to be assessed before the registrar.

At the hearing before the registrar, it was submitted that the plaintiffs were held up for some two hours from 5.40am until 7.40am. They were unable to collect their baggage unless they settled the sum the defendant demanded. For most of the time, they were kept standing at the baggage counter. The defendant's employees were rude. At the time when the defendant's employees directed them to the baggage counter to have their baggage reweighed other passengers were present. The plaintiffs were embarrassed.

Both the parties submitted the affidavits of their witnesses to the registrar. The witnesses were also cross examined in person before him.

The first plaintiff was a practising lawyer. He was the head of the youth wing of the Malaysian Indian Congress and was also its Chief of Information for the State of Perak. He also held the chairmanship of two private registered companies. At the time he arrived at Subang Airport, his friends and supporters were waiting to welcome him. He did not have enough money to pay to the defendant as he had already spent all of it on his relatives in India. He had to resort to borrow the sum from his friends in consequence of which they had put him in low esteem. By reason of the act of the defendant he said he suffered physical inconvenience, mental distress, agony, humiliation, loss of reputation and injured feelings.

The second plaintiff was the wife of the first plaintiff. She went through the same experience and claimed to have suffered the same loss as the first plaintiff as a result. She also claimed to have suffered flight phobia as she came to realize later that the plane had been flying with excess weight and had therefore compromised on safety. She consulted her doctor, a Dr Raja Ram, who gave evidence supporting her complaint. He treated her for weakness and fatigue, but not for any psychological condition.

A The third plaintiff was a housewife and a part time operator undertaking tours for groups to India. She also claimed to have suffered the same loss as the first plaintiff. She was disturbed by the incident that she could not continue her part time tour business and had to be brought by a friend to see a priest in India. In addition, she also claimed a loss of income as a result of not being able to continue with her business.

B The defendant's two employees who undertook the reweighing of the baggage denied that they had treated the plaintiffs harshly although they did not deny that the plaintiffs were kept at the airport for some two hours.

At the hearing before the registrar, counsel for the plaintiffs submitted that the first, second and third plaintiffs had suffered non pecuniary loss on C account of the fact that they had undergone physical inconvenience, mental distress, agony and humiliation. It was also submitted that the first plaintiff, who was a politician with a large following, and his wife (the second plaintiff) had also suffered the loss of reputation and injured feelings. Additionally, she had also suffered from flight phobia.

D The registrar found that the plaintiffs had indeed suffered physical inconvenience, mental distress, agony and humiliation for having been kept 'virtually captive' at the airport.

Additionally, he found the first plaintiff by reason of his position as a practising lawyer, businessman and politician, had also suffered loss of reputation. He relied on *Chitty on Contracts* (28th Ed) paras 20–040 which E states that such non pecuniary loss can be claimed, 'where the breach of contract causes the plaintiff physical inconvenience or discomfort — *Burton v Puseketon* (1876) LR 2 Ex 3440'.

With respect to the damages under the head 'disappointment and mental distress', he relied on the English Court of Appeal case of *Jarvis v* F *Swans Tours Ltd* [1973] QB 233. He found that the plaintiffs in the instant case had suffered physical inconvenience having to wait at the airport for two hours. They were able to leave only after they settled the extra baggage charge of RM618 without being provided with any form of comfort in the meantime.

G Consequently, the registrar awarded general damages on a global basis to the plaintiffs, encompassing the elements described as follows:

(i) to the first plaintiff the sum of RM75,000, for physical inconvenience, mental distress, agony, humiliation, and loss of reputation;

(ii) to the second plaintiff the sum of RM12,000, for physical H inconvenience, mental distress, agony and humiliation; and

(iii) to the third plaintiff the sum of RM15,000, for physical inconvenience, mental distress, agony and humiliation.

Contract or tort — remoteness of damages

I The judgment of Kamalanathan Ratnam JC (as he then was) itself did not appear to have ruled whether the defendant was in breach of contract. But the registrar had proceeded to assess damages on the basis that the

defendant had committed a breach of contract, a fact to which both parties have resigned themselves to accept — this notwithstanding that the defendant could not have been liable on a breach of contract — for its contractual obligation had been performed and discharged without a breach by the time the plaintiffs landed with their baggage at Subang International Airport.

Any assessment of damage must necessarily begin with the first principle — a consideration of remoteness of damage with respect to the loss that the successful plaintiff is claiming. But whether the damage to be assessed arose from a breach of contract or from a tort is crucial — for an assessment of damage involves the fundamental consideration of remoteness of damage, the principle of which is different in contract and tort, an issue which I shall address later in this judgment.

As Edgar Joseph Jr J said in *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 at 366 and followed in the Supreme Court case of *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569:

> A word now about general principles. When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong, and also that the damages are not too remote to be recoverable. The principle of remoteness of damage is a limiting principle of policy and the principles applicable in contract and tort are not the same (see *Koufos v Czarnikow Ltd (The Heron II)* [1969] 1 AC 350).

Assuming the damages arose from a breach of contract —

Remoteness of damage in contract is governed by s 74 sub-s (1) and (2) of the Contracts Act 1950 ('the CA') which reads as follows:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

The purport of the section, it would appear, was derived from the celebrated speech of Alderson B in *Hadley v Baxendale* (1854) 9 Exch 341 at pp 354–355:

> We think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may be fairly and reasonably be considered either arising naturally, ie according to the natural course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Whether plaintiffs can claim non pecuniary loss in contract

The defendant's appeal appears to have been anchored principally on the submission that non pecuniary loss should not be awarded to the plaintiffs in this case on the general principle that non pecuniary loss cannot be awarded in contract. She relied on a passage in the Singapore High Court case of *Haron bin Mundir v Singapore Amateur Athletic Association* [1992] 1 SLR 18, at p 30H, per Selvam JC:

> The plaintiff also claims general damages for emotional damage, mental anguish, humiliation and reputation. These are unquestionably recognized heads of damage in the regime of tort. In the realm of contract general damages for physical injury may be awarded in cases of breach of contract for sale of goods: see *Wren v Holt* where injury was caused by beer containing arsenic; *Godley v Perry* where injury was caused by a defective catapult. As a result of *Donoghue v Stevenson* the same facts would now also give rise to either concurrent or alternative liability in tort. However, as a general rule damages for frustration, injured feeling, mental distress, humiliation and loss of reputation will not as a rule be awarded for breach of contract: *Bliss v South East Thames Regional Health Authority*. In *Addis v Gramaphone Co Ltd*, the House of Lords regarded the general rule as too inverterate to be altered even if it were desirable.

Selvam JC was speaking of the general rule. One must appreciate that contracts are concerned with commercial matters and that the obligations of the parties involve mainly the fulfillment and enforcement of bargains. Such non pecuniary loss as frustration, injured feelings, mental distress and loss of reputation suffered by a party as a result of a breach are therefore not generally regarded as matters that arose in the natural course of events or were within the contemplation of the contracting parties when they entered into the contract. They are therefore considered remote and generally irrecoverable unless the contract is of the kind that affects his personal interest. *McGregor on Damages* (1997 Ed) explains the law in paras 92 and 99 of his work:

> Contract is primarily concerned with commercial matters and therefore the protection afforded by the law of contract is primarily directed to commercial losses. Indeed it has been said that 'in an action founded on breach of contract the only kind of loss ... Which is a subject of compensation is a financial loss.' (*Sunley v Cunard White Star* [1939] 2 KB 791 at 799, per Hallett J) But this today too sweeping a statement, as will appear as the various possible heads of non pecuniary loss are considered.
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> If however, the contract is not primarily a commercial one, in the sense that it affects not the plaintiff's business interest, but his personal, social and family interests, the door should not be closed to awarding damages for mental suffering (*or any other non pecuniary loss*) if the court thinks that in the particular circumstances the parties to the contract had such damage in their contemplation. (Emphasis added.)

Bingham LJ summed up the point in the later Court of Appeal case of *Watts & Anor v Morrow* [1991] 1 WLR 1421, in this way at p 1445:

> A contract breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or maybe, but on consideration of policy. But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided if the contrary result is procured instead.

A B

But the contract that the parties entered into in this case (a contract of carriage to convey the plaintiffs from India to Malaysia) was clearly of a nature that affected the personal, social and family interest of the plaintiffs. It therefore belongs to that class in which non pecuniary loss may be awarded for any breach being omitted by the defendant. Whether or not the plaintiffs may make such claims rests purely on the question of remoteness under the rule in *Hadley Baxendale* — an issue which I shall address shortly.

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Whether the claim is too remote

The question that must now be asked is whether the non pecuniary loss suffered by the plaintiffs arose naturally from the breach, or whether such loss was within the contemplation of the parties when they entered into the contract of carriage. More precisely, one should ask the question whether by having their baggage reweighed at Subang International Airport at Kuala Lumpur, the plaintiffs would in the natural course of things have suffered the non pecuniary loss they are now claiming or whether such loss was within their contemplation.

E

It would be quite legitimate to assume that if the defendant chose to reweigh the plaintiffs' baggage at Subang Airport in breach of its contract with the plaintiffs, the plaintiffs would not in the natural course of things have suffered such aggravated pecuniary loss as mental distress, agony, humiliation, loss of reputation and injured feelings. Nor would such losses be reasonably expected to be within the contemplation of the plaintiffs and defendant when they entered into the contract. These are clearly matters which under s 74(1) and (2) of the CA would be considered too remote and therefore unrecoverable.

F G

But that is not to say that in the natural course of things, the plaintiffs would not be expected to suffer any loss under the circumstances. They would. The loss, however, would be limited only to some inconvenience and discomfort that would not have allowed them to make any claim — for they would not have been substantial enough to be recoverable. As Mellor J said in *Hobbs & Wife v The London and South Western Railway Co*, at p 122:

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> I quite agree with my brother Parry, that for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages. That is purely

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> sentimental, and not a case where the word inconvenience, as I here use it, would apply. But I must say, if it is a fact that you arrived at a place where you did not intend to go to, where you are placed, by reason of breach of the contract of the carriers, at a considerable distance from your destination, the case may be otherwise.

There is a strong rationale to support what Mellor J said. It has to do with the maxim *de minimis non curat lex* — the court does not deal in trivialities. It is not uncommon for a contracting party to encounter some difficulty in the performance of his obligation. Where eventually that obligation is performed, surely some allowance exempt from liability within the permissible limit of give and take can be made for minor imperfections?

The Court of Appeal case of *Jarvis v Swans Tours Ltd* [1973] QB 233 relied upon by counsel for the plaintiffs and accepted by the registrar as authority that such non pecuniary damage may be awarded, can be distinguished on the facts.

In that case, the plaintiff had booked a winter sports holiday to Switzerland on the strength of the defendant tour company's lavishly illustrated travel brochure, only to discover that the great time promised did not materialize. Many facilities that the defendant promised would be provided did not exist as a result of which the plaintiff suffered disappointment, distress, annoyance and frustration. The ratio for allowing the plaintiff's claim appears in the following passage of the speech of Edmund Davis LJ at p 239 of the judgment:

> If in such circumstances travel agents fail to provide a holiday of the contracted quality, they are liable in damages. In assessing those damages the court is not, in my judgment, restricted by the £63.45 paid by the client for his holiday. Nor is it confined to matters of physical inconvenience and discomfort, or even to quantifying the difference between such items as the expected delicious Swiss cakes and the depressingly desiccated biscuits and crisps provided for tea, between the ski-pack ordered and the miniature skis supplied, nor between the very good ... house party arrangements assured and the lone wolf second week of the unfortunate plaintiff's stay. The court is entitled, and indeed bound, to contrast the overall quality of the holiday so enticingly promised with that which the defendants in fact provided.

In determining what would be proper compensation for the defendants' marked failure to fulfil their undertaking, I am of the opinion that, again to use Mellor J's terms ((1875) LR QB 111 at p 122), 'vexation' and 'being disappointed in a particular thing you have set your mind upon' are relevant considerations which afford the court a guide in arriving at a proper figure.

When a man has paid for and properly expects an invigorating and amusing holiday and, through no fault of his, returns home dejected because his expectations have been largely unfulfilled, in my judgment it would be quite wrong to say that his disappointment must find no reflection in the damages to be awarded. And it is right to add that in the course of his

helpful submissions, Mr Thompson did not go so far as to submit anything of the kind. Judge Alun Pugh took that view in *Feldman v Allways Travel Service* (1957) CLY 934. That, too, was a holiday case. The highly experienced senior county court judge there held that the correct measure of damages was the difference between the price paid and the value of the holiday in fact furnished, 'taking into account the plaintiff's feelings of annoyance and frustration.'

The trial judge clearly failed to approach this task in this way, which in my judgment is the proper way to be adopted in the present case. He said:

> There is no evidence of inconvenience or discomfort, other than that arising out of the breach of contract and covered by my award. There was no evidence of physical discomfort, eg, bedroom not up to standard. His failure is manifested, not only by these words, but also by the extremely small damages he awarded, calculated, be it noted, as one half of the cost of the holiday. Instead of 'a great time,' the plaintiff's reasonable and proper hopes were largely and lamentably unfulfilled. To arrive at a proper compensation for the defendants' failure is no easy matter. But in my judgment, we should not be compensating the plaintiff excessively were we to award him the £125 damages proposed by Lord Denning MR. I therefore concur in allowing this appeal.

The passage in the judgment indicates clearly that the damages suffered by Jarvis arose directly from the failure of the defendant's tour company to provide the 'invigorating and amusing' holiday that it had promised the plaintiff.

That the damages had arisen in the nature of things in *Jarvis's* case was too obvious that the Court of Appeal did not find it necessary to consider whether the plaintiff's claim for disappointment, distress, annoyance and frustration came within the principle of remoteness of damage. The defendant's liability was taken for granted and damages under the respective heads were awarded as a matter of course.

Unlike *Jarvis*'s case however, the defendant's breach in the instant case was not its failure to convey the plaintiffs and their baggage from Madras to Kuala Lumpur, but its act in reweighing the plaintiffs' luggage and unlawfully imposing the excess baggage charge upon the plaintiffs, and in the process caused the plaintiffs to suffer the non pecuniary loss which they are now claiming — clearly a happening which did not arise from the natural course of things nor within the contemplation of the parties, and was therefore irrecoverable.

The Court of Appeal case of *Hobbs & Wife v The London and South Western Railway Co* (1875) LR QB 111 serves to illustrate the limit placed by the court in respect of claims for non pecuniary loss incurred by a breach of contract by a carrier, based on the principle of remoteness of damage.

In that case, the London and South Western Railway Co in breach of its contract of carriage, failed to convey the plaintiff and his family to their intended destination. They were left stranded in the middle of the night.

A They had to walk some five miles to reach their house, in consequence of which the plaintiff's wife suffered cold and was unable to assist her husband in his business as before and medical expenses were incurred. It was held that the plaintiff was entitled to the 8 pounds sterling damages awarded for the inconvenience suffered in consequence of being obliged to walk home. The plaintiff was not entitled, however, to the 28 pounds sterling awarded B for the illness suffered by the wife and its consequences as this did not result naturally from the breach and was therefore too remote.

The speech of Blackburn J (Mellor and Archibald JJ concurring) at pp 121–122 conveys the ratio of the court:

> C Then comes the further question, whether the damages for the illness of the wife are recoverable; I think they are not, because they are too remote. On the principle of what is too remote, it is clear enough that a person is to recover in the case of a breach of contract the damages directly proceeding from that breach of contract and not too remotely. Although Lord Bacon had, long ago, referred to this question of remoteness, it has been left in very great vagueness as to what constitutes the limitation; and therefore I agree with what my Lord D has said to-day, that you make it a little more definite by saying such damages are recoverable as a man when making the contract would contemplate would flow from a breach of it. For my own part, I do not feel that I can go further than that. It is a vague rule, and as Bramwell, B, said, it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but on the question now before the E court, though you cannot draw the precise line, you can say on which side of the line the case is; I do not see the analogy between this case and the case that was suggested, where a railway company made a contract to carry a passenger, and from want of reasonable care they dashed that passenger down and broke his leg, and he recovers damages from them. For such a breach as that, the most direct, immediate consequence is, that he would be lamed. That is the direct consequence of such a breach of contract; but though here the contract F is the same, a contract to carry the passenger, the nature of the breach is quite different; the nature of the breach is simply that they did not carry the plaintiff to his destination, but left him at Esher. To illustrate this, — suppose you expand the declaration and say: You, the defendants, contracted to carry me safely to Hampton Court, you negligently upset the carriage and dashed me on the ground, whereby I became ill and sick. That is a clear and immediate G consequence. The other case is: You contracted to carry me to Hampton Court, you went to Esher, and put me down there, by which I was obliged to get other means of conveyance, for the purpose of getting to Hampton Court; and because I could find no fly or other conveyance, I was obliged, as the only means of getting to Hampton, to walk there, and because it was a cold and wet night, I caught cold, and I became ill. When it is put in that way, there are H many causes or stages which there are not in the other. With regard to the two instances my Lord put — one, of the passenger, when walking home in the dark, stumbling and breaking his leg, the other, of his hiring a carriage, and the carriage breaking down, — I must say I think they are on the remote side of the line, and further from it than the present case.

I Assuming that the damages had been assessed on the basis that the defendant had committed a breach of contract (an issue which I shall revert to shortly), the plaintiffs would have failed to recover any loss under the principle of remoteness.

It is true that assessment of damages has always been the province of the registrar, who is to all intents, the judge for the purpose whose award is seldom disturbed by the court. As Greer LJ said in *Flint v Lovell* [1935] 1 KB 354, at p 360:

> ... this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages, it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgement of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

But the registrar in this case had clearly acted on the wrong principle. I am therefore constrained to disagree with the submission of counsel for the plaintiffs that the registrar's decision should not be disturbed.

Assessment of damage based on tort

But the defendant's liability clearly arose from a tort rather than from a breach of contract. The judgment, it is clear, was entered on the ground that the defendant did not have the right to have the plaintiffs' baggage reweighed at the final destination and to impose on them the further excess baggage charges. The following paragraph in the judgment confirms the point:

> Oleh itu, mahkamah ini telah memutuskan bahawa defendan tidak berhak untuk meminta plaintif menimbang semula bagasinya di destinasi muktamad dan menuntut pembayaran caj bagasi tambahan. Defendan hanya berhak membuat demikian di poin asal, iaitu di Lapangan Terbang Madras. Maka, dengan ini, saya telah membenarkan permohonan plaintif dan mengarahkan bahawa suatu tarikh awal ditetapkan oleh penolong kanan pendaftar bagi menaksirkan ganti rugi yang dialami oleh plaintif.

The infringement of the plaintiffs' right not to be forced into paying the excess baggage would have, under the circumstances, given rise to an action in tort. As *Clerk & Lindsell on Tort* (18th Ed), explained at paras 1–22:

> *Violation of interest.* The commission of a tort requires proof that an interest recognized by the law of torts has been violated by conduct prohibited by the law of torts. The law slowly evolved from the writs of trespass and the action on the case and no single thread of principle governed the development of new torts. The very language of torts, the Norman-French word 'tort' itself and its genesis in trespass suggest an emphasis on 'wrongs' and wrongdoing. Yet for conduct to be treated as a 'wrong' presupposes the existence of a 'right'. The defendant's conduct is wrong because it violates a right enjoyed by the plaintiff. Identifying the 'rights' and interests protested by the law of torts is however no easy task. By no means every interests of humankind falls within the protection of the law of torts.

A The tort committed upon the plaintiffs in this instance comes within that general category of infringement of their legal right causing them to suffer the non pecuniary loss they are now claiming. Rightly, therefore the assessment of damages should have been based on liability in tort and not breach of contract. There could not have been any breach of contract on the part of the defendant as its obligation under the contract had been duly B performed upon conveying the plaintiffs to Subang Airport.

A tort arising from the infringement of a legal right (as in defamation) is actionable per se, that is to say, damage is presumed merely upon proof of the infringement of such a right. There is no need for the plaintiff to prove (as in negligence) a causal connection between the wrong done C and the damage suffered in consequence, such that the question of remoteness is quite irrelevant. The principle had its origin in the *Ashby v White* (1703) 2 Lord Ryam 938, but was restated with approval by Lord Wright in the Court of Appeal case of *Nicholls v Ely Beet, Sugar Factory Ltd* [1936] Ch 343 at p 350, where the following general proposition was made:

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> ... the ability to maintain such an action without proof of actual loss depends on a much wider principle, that is the principle that where you have an interference with a legal right the law presumes damage.

The infringement of the plaintiffs' rights having been established, it would now only be necessary to measure the damages to be awarded. E

Measure of damages

In attempting to measure the damages that may be awarded to the plaintiffs, two basic principles of assessment must first be understood.

F The first is with respect to its function. As Lord Blackburn said in *Livingstone v The Rawyards Coal Co* (1880) 5 App Cas 25 at p 39, damages is:

> That sum of money which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or G reparation.

The second is a corollary of the first — that in awarding damages, the plaintiff should not be allowed to profit by it. The principle is enunciated in the Federal Court case of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777, wherein Edgar Joseph Jr FJ, speaking H for the panel said at p 788:

> It goes without saying that the effect of allowing the plaintiff's claim is to put him in a better position than he would have been if there had been no breach, then this would be contrary tot he principles enunciated in the cases cited above.

I In proposing this principle, the Federal Court relied on the English Court of Appeal case of *C & P Haulage (a firm) v Middleton* [1983] 3 All ER 94, wherein Ackner LJ said at p 99:

> It is not the function of the court where there is a breach of contract knowingly, as this would be the case, to put the plaintiff in a better financial position than if the contract had been properly performed.

If the two principles are properly appreciated, it will be at once discernible that the registrar had awarded too much for too little. The award in multiples of thousands is in my view, outrageously excessive and disproportionate. The amount awarded to each plaintiff exceeded many times the cost of air passage that he may have paid.

There is yet another principle one must be acquainted with — that a claimant must prove his loss. As Lord Goddard said in *Bonham-Carter v Hyde Park Hotel Ltd* 64 TLR 177 at p 178 and adopted and applied in *John v Dharmaratnam* [1962] MLJ 187 and more recently in *Tan Sri Khoo Teck Phuat* at p 784:

> ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages.' They have to prove it.

To 'prove', in the context of the speech of Lord Goddard means to provide some form of evidence sufficient to convince the decider to the point that he believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act on the supposition that it exists (see s 2's definition of 'prove' in the Evidence Act 1950.)

The plaintiffs provided none of the evidence that they claimed to have suffered beyond the mere assertion of having suffered them.

The testimonies of the two witnesses (who claimed to be the supporters of the first plaintiff awaiting his arrival at the airport) to the effect that their esteem of him had been lowered after the incident, demonstrates in my view, the extent to which the first plaintiff was prepared to go to embellish his claim. Their testimonies were clearly unbelievable and ought not to have been accepted as proof that the first plaintiff had suffered loss of reputation. No right thinking person would have harboured such a negative sentiment unless the plaintiff was being detained for a criminal act. Being forced to wait at the airport for a while longer than necessary for the purpose of attending to problems relating the clearance of one's baggage was nothing extraordinary.

The same observation applies with respect to the second plaintiff. The medical practitioner who gave evidence did no more than repeat her complaints. No formal examination or test was conducted on her to verify her complaints. Above all, her complaint of suffering flight phobia by reason that the plane was carrying excess weight was totally unfounded. There was no evidence that the safety of the flight was compromised by carrying excess weight.

As for the third plaintiff, her claim that she suffered so much from the incident that she was unable to continue with her part-time business of organizing tours and had to seek the blessing of a priest in India is absolutely

A unrealistic. A reasonable man would not be able to comprehend how the effect of being detained at the airport for two hours and being made to pay additional excess baggage can cause such sufferings in her person as to affect her capacity to continue with her part-time tour business.

B *A case for nominal damage?*

The plaintiffs had proved that their legal right had been infringed. If the submission of counsel for the defendant that the plaintiffs have failed to prove that they suffered any loss is correct, this would mean that only nominal damages may be awarded to the plaintiffs.

C As Lord Halsbury LC in *The 'Mediana'* [1900] AC 113 said at p 116:

> 'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.

D Lord Halsbury spoke of 'nominal damages' in the narrow sense. Modern jurisprudence however, recognizes at least two sets of circumstances under which such damages may be appropriately awarded. Wee Chong Jin CJ sets them out accurately in the Singapore Court of Appeal case of *Fraser & Neave Ltd v Yeo Hiap Seng Ltd* [1989] 1 MLJ 91 at pp 95–96:

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> (1) Where there is *injuria sine damno*. An *injuria* or wrong entitles the plaintiff to a judgment for damages in his favour even without loss or damage, but where there is no loss or damage such judgment will be for nominal damages only ...
>
> (2) Where damage is shown but its amount is not sufficiently proved. The problem is simply one of proof, one not of absence of loss but of absence of evidence of the amount of loss. Our present case is clearly one of absence of loss.

F I would not however, go so far as to say that the plaintiffs had not suffered any loss for the period that they were kept at the airport, or that they were G unable to prove that they had so suffered. An award of nominal damages under the circumstances is inappropriate. They did, as I said, suffer some discomfort and inconvenience, albeit for a short duration of only two hours. As trivial and small as they may appear, nevertheless the plaintiffs are entitled to have them assessed. As Lord Evershed said in *Kitchen v Royal Air Forces Assoc & Ors* [1958] 2 All ER 241 at pp 250–251:

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> In my judgment, assuming that the plaintiff has established negligence, what the court has to do in such a case as the present is to determine what the plaintiff has lost by that negligence. The question is: Has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case, it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can.

I Had their egress from the airport been without let or hindrance, they would have arrived home some two hours earlier — in time to start a new day with

a clear mind and purpose. In all fairness therefore, they should be compensated for the discomfort and inconvenience they had undergone. This should translate in monetary form, in my estimate, to the cost of providing each of them with a day's rest, say the sum of RM300.

There shall be an order that the defendant pay to each plaintiff the sum of RM300 as damages.

Appeal allowed.

Reported by Lim Lee Na